FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 24 1964
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

No. 623 — October Term, 1964

JOHN H. HUGHES and LAWRENCE M. RULISON,
*Intervenors-Appellants,*

and

JOHN P. LOMENZO, Secretary of State of the State of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
*Appellants,*

*—against—*

WMCA, INC., R. PETER STRAUS, JOSEPH DeMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,
*Plaintiffs-Appellees,*

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; MAURICE J. O'ROURKE, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,
*Defendants-Appellees.*

On Appeal From The United States District Court For The Southern District of New York

## JURISDICTIONAL STATEMENT OF JOHN H. HUGHES AND LAWRENCE M. RULISON

JOHN H. HUGHES and
LAWRENCE M. RULISON,
*Attorneys Pro Se,*
600 O. C. S. Bank Bldg.,
Syracuse, New York 13202

Richard S. Scolaro,
*Counsel*

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Jurisdiction | 2 |
| Questions Presented | 3 |
| Constitutional Provisions Involved | 3 |
| The District Court's ruling unduly and unreasonably prejudices intervenors, Senators John H. Hughes and Lawrence M. Rulison | 7 |
| The remaining question is whether the District Court acted properly, under this Court's directive, in requiring the Legislature to reapportion by April 1, 1965 | 10 |
| Conclusion | 10 |
| Appendix A: | |
| July 27, 1964 Decree of District Court | 1a |


CITATIONS:


| | |
|---|---|
| *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, at pp. 724-730 | 10 |
| *Maryland Committee for Fair Representation* v. *Tawes*, 337 U. S. 656 (1964) | 7 |
| *Reynolds* v. *Sims*, 208 Fed. Supp. 431 | 4, 5, 6, 10 |
| *Roman* v. *Sincock*, 377 U. S., at p. 711 (1964) | 5 |
| *White* v. *Anderson*, —— Col. ——, 394, p. 2d 333 | 10 |
| Statutes: | |
| Article III, § 2, New York State Constitution | 3, 7 |
| Article III, § 2-5, New York State Constitution | 3 |
| Amendment XIV, United States Constitution | 3, 5 |
| Miscellaneous: | |
| 28 U. S. C. A. § 1253 | 2 |

IN THE

# Supreme Court of the United States

No. — October Term, 1964

JOHN H. HUGHES and LAWRENCE M. RULISON,
*Intervenors-Appellants,*

and

JOHN P. LOMENZO, Secretary of State of the State of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
*Appellants,*

*—against—*

WMCA, INC., R. PETER STRAUS, JOSEPH DeMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,
*Plaintiffs-Appellees,*

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; MAURICE J. O'ROURKE, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,
*Defendants-Appellees.*

On Appeal From The United States District Court For The Southern District of New York

## JURISDICTIONAL STATEMENT OF JOHN H. HUGHES AND LAWRENCE M. RULISON

This appeal is taken from the July 27th, 1964 Order of the Federal District Court, Southern District of New York, sitting as a three judge Statutory Court. The District

Court's decree, entered on August 4th, 1964, held, on the mandate of this Court, that the legislative apportionment formulas of New York State were unconstitutional and void under the Fourteenth Amendment of the United States Constitution. This Order further provided that the November 1964 election of State legislators "shall be conducted as presently scheduled," but that Members of the Legislature so elected shall hold office for a period of only one year, ending on December 31st, 1965; that the New York State Legislature must enact a constitutionally valid apportionment scheme prior to April 1, 1965; that a second or "extra" election for Members of the State Legislature must be held in November of 1965 under this new apportionment scheme, with Members so elected to hold office again for a period of one year, ending on December 31, 1966. This Order, in effect, modifies those provisions of the New York State Constitution governing the terms of office for members of the State Legislature, an issue heretofore neither raised in the original complaint, nor considered by this Court.

## JURISDICTION

This Appeal is authorized by 28 U.S.C.A. § 1253.

Following the announcement of the District Court on July 27, 1964, John H. Hughes, as a duly elected State Senator representing the 45th Senatorial District of the State of New York, as a member of the Joint Legislative Committee on Reapportionment, and as a duly nominated candidate for reelection from said District to the New York State Senate, and Lawrence M. Rulison, as a duly elected State Senator, representing the 44th Senatorial District of the State of New York, and as a duly nominated candidate for reelection from said District to the New York State Senate, petitioned the District Court for an Order, pursuant to FRCP, Rule 24, to allow them to intervene in this

case as parties defendants. On August 24, 1964, the three judge District Court granted their motion to intervene. Thereafter, and on August 25th, 1964, interventors-appellants filed a Notice of Appeal in the office of the Clerk of the District Court (S.D.N.Y.)

## QUESTIONS PRESENTED

A. Whether the United States District Court for the Southern District of New York abused or exceeded the authority and discretion conferred upon it by the mandate of the Supreme Court of the United States dated July 10, 1964, in disregarding those portions of Article III, § 2 of the New York State Constitution which designate two years as the term of office of New York State Legislators;

B. Whether the United States District Court for the Southern District of New York erred or acted unreasonably in requiring the New York State Legislature to enact into law a valid apportionment scheme in compliance with the XIV Amendment to the United States Constitution before April 1, 1965; and in denying the legislature or its constituents a reasonable time in which to implement those methods presently available under the New York State Constitution to enact an apportionment scheme in compliance with the United States Supreme Court's decision herein.

## CONSTITUTIONAL PROVISIONS INVOLVED

Upon a complaint that "Article III §§ 2-5 of the Constitution of the State of New York are (similarly) void and invalid as being contrary to the Fourteenth Amendment of the Constitution of the United States" (Complaint, p. 15 at (b)), this Court held that:

> "New York's Constitutional formulas relating to legislative apportionment demonstrably include a built-in bias against voters living in the State's more populous counties"

and as such the *formulas* could not be "constitutionally condoned" (377 U.S. 633, 653, 654). (Emphasis added).

This Court then remanded the case to the District Court "for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims*", adding:

> "Since all members of both houses of the New York Legislature will be elected in November 1964, the court below, acting under equitable principles, must now determine whether, because of the imminence of that election and in order to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, it would be desirable to permit the 1964 election of Legislators to be conducted *pursuant to the existing provisions*, or whether under the circumstances the effectuation of appellants' right to a properly weighted voice in the election of state legislators should not be delayed beyond the 1964 election." (377 U.S. at p. 655). (Emphasis added).

The only issue raised and considered by this Court was the constitutional validity of New York State's apportionment formulas. The remedial alternatives offered by this Court explicitly prescribed definable standards within which the District Court should have acted; (1) to allow the November elections "pursuant to existing provisions" and require apportionment thereafter, or (2) postpone the elections until after a valid scheme be promulgated.

Cognizant of the unnecessary confusion and chaos which might otherwise result, the District Court partially followed the Court's directive by ordering (Appendix A, *infra*):

> "Inasmuch as the primary election of June 2, 1964, had been held and nominees chosen prior to the decision of the Supreme Court of June 15, 1964, and in view of the imminence of the 1964 election of Members of the New York State Legislature and in order to give the New York State Legislature an opportunity to

fashion a constitutionally valid legislative apportionment plan, the 1964 election of Assemblymen and Senators shall be conducted as presently scheduled."

However, instead of allowing the November 3rd election to be conducted "pursuant to existing provisions" as indicated by this Court, the District Court abused and/or exceeded the authority and discretion conferred upon it by further ordering that:

"the terms of said Members so elected on November 3, 1964 or at any special election to fill vacancies, shall expire on December 31, 1965."

thus reducing the constitutionally provided term of two years to one year."

The District Court further directed:

"that not later than April 1, 1965, the Legislature shall have enacted into law a valid apportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965, Members so elected to hold office for a term of one year, ending December 31, 1966."

Pursuant to this Order New York State must hold three general elections for members of the Legislature within the next three years. This can only result in causing a serious disruptive effect in the State's legislative processes — a situation which this Court specifically desired to avoid. See, *Roman* v. *Sincock*, 377 U. S., at p. 711 (1964).

In *Reynolds* v. *Sims*, 377 U. S. 533 (1964), this Court expressly conveyed its concern with minimizing undue disorder and confusion. The Chief Justice stated:

"We agree with the view of the District Court that State constitutional provisions should be deemed violative of the Federal Constitution only when validity asserted constitutional rights could not otherwise be

protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible." (377 U. S., at p. 534).

It would certainly appear that since this Court acknowledges a desirability to "accommodate" the effectuation of a remedial apportionment plan to the existing apportionment provisions insofar as possible, the District Court should have refrained from modifying the non-apportionment provisions of the New York State Constitution, which govern the length of a Legislator's term of office. The District Court could have remained within the standard suggested by this Court "by ordering the election this November to be conducted pursuant to existing provisions", which would have provided the necessary relief without unduly prejudicing appellants.

Further, since New York State's constitutional provisions relating to the term of office for Members of the Legislature were neither relevant to the apportionment issue, nor properly before the District Court, the District Court improvidently and unnecessarily reduced the subject term of office from a two year to a one year period.

Right reason, efficiency and economy of government should negate such a precipitate modification of New York State's election process. This Court in *Reynolds* v. *Sims*, 377 U. S. 533 (1964) cited with approval the District Court's mandate allowing the Legislature until the next scheduled general election of the Alabama State Legislature in 1966 to reapportion. Specifically this Court stated:

"With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." (377 U. S., at p. 584)

Similarly in *Maryland Committee for Fair Representation* v. *Tawes*, 337 U. S. 656 (1964), this Court instructed the Maryland courts not to:

> "feel obliged to take further affirmative action . . . (unless) the Legislature fails to enact a constitutionally valid state legislative apportionment scheme in timely fashion after being afforded a further opportunity to do so. However, under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan." (377 U. S., at p. 676).

Thus this Court, having full opportunity to do so, did not require a special election between the regular terms of office. It follows that this Court never implied that reapportionment should proceed in so hasty a manner that a special "extra" election, invalid under State Constitutional provisions (Article III, Section 2, New York State Constitution), must be ordered. The indication is clearly otherwise.

## THE DISTRICT COURT'S RULING UNDULY AND UNREASONABLY PREJUDICES INTERVENORS, SENATORS JOHN H. HUGHES AND LAWRENCE M. RULISON.

Intervenors-Appellants, John H. Hughes and Lawrence M. Rulison fully expected to be candidates for a two year term of office at the time of their nomination. However, subsequent to this time the District Court reduced the term of office for Members of the Legislature from two to one year and further directed that a second "special" election for Members of the Legislature must be held in November of 1965. This Order directly results in unduly prejudicing Appellants by making it necessary for them to expend considerable time, effort and money organizing and maintaining a political campaign for a legislative term, severely reduced

from what was expected at the time of their nomination. These campaign efforts, initially occasioned by Appellants' desire to serve the people of New York for a full two year term, vary from campaign to campaign but the cost remains high. Now, in order to continue in office for the full two years, this considerable expense will unnecessarily be doubled.

In addition to the prejudice to Intervenors, the State of New York, the County of Onondaga and the political parties within the State will be required to organize and maintain, at considerable financial expense, an extra campaign and election. For the June 2, 1964 primary election in the First Assembly District of Onondaga County alone, in excess of $2,300.00 was spent by Citizens' committees on behalf of their candidate. The cost to the County to conduct the primary election exceeded $41,000.00 and the estimated expense for the general election is in excess of $70,000.00. Thus the total amount required to be spent by Onondaga County for the 1964 elections will exceed $100,000.00. If all 62 counties in the State of New York are considered the cost of the 1964 elections will run into many millions of dollars. While a certain part of this amount is necessitated by local or statewide elections and only a percentage is attributable to legislative elections, that part so attributable is substantial. The District Court's Order would require a similarly large expenditure next year and the year thereafter.

Aside from the additional cost to Appellants and the State of New York, this extra legislative election could result in a disruptive and chaotic condition throughout the state. Traditionally, the New York State Legislature has functioned on the basis of a two year term. Principally, this term was instituted to provide both sufficient time for

Members to examine and act upon proposed legislation and to provide continuity of legislative action over two general sessions. In furtherance of these objectives the great bulk of representative action is delegated to various standing committees, which ordinarily are required to annually report at the next general session. These committees function throughout the entire year, but in a non-election year much of the committee work is accomplished from April 1 to December 31, when the Legislature is not in general session. During this period they sponsor public hearings, investigate the many and complex problems within the State in anticipation of recommending remedial measures, consider, examine, and modify proposed and pending legislation, initiate and draft new statutes, and most importantly, administer a 3.5 billion dollar budget.

This system is most vital to a well organized and efficient legislature. Any modification which either directly or indirectly reduces the effectiveness of the committee system hampers punctual, responsive representation. Yet the District Court, with only a cursory interest in legislative machinery, has severely restricted committee effectiveness by ordering a special election in November of 1965. This special election includes logically, a special primary and a special campaign. Thus, time that would otherwise be spent in the diligent and conscientious performance of committee responsibility will be unavoidably directed toward organizing and maintaining complex campaign facilities. For a period of at least eight weeks committee action will be subordinated to general campaign purposes. It automatically follows that committee responsibility and effectiveness will be severely restricted and final legislative action will be unduly delayed.

## THE REMAINING QUESTION IS WHETHER THE DISTRICT COURT ACTED PROPERLY, UNDER THIS COURT'S DIRECTIVE, IN REQUIRING THE LEGISLATURE TO REAPPORTION BY APRIL 1, 1965.

Throughout the short history of the apportionment cases hasty and non-concerted efforts to promulgate new apportionment schemes have uniformly proved unsatisfactory. Such schemes have further delayed equitable apportionment and in most instances have resulted in the chaos and confusion which this Court has specifically attempted to minimize. See, *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, at pp. 724-730, *White* v. *Anderson*, —— Col ——, 394, P. 2d 333, *Reynolds* v. *Sims*, 208 Fed. Supp. 431. Since there appears to be no valid reason to require a special election in 1965, Appellants contend that the District Court's Order, requiring apportionment by April 1, 1965, is unnecessary. Intervenors pray that this Court allow them an adequate opportunity to conscientiously and effectively examine and promulgate a valid reapportionment plan.

## CONCLUSION

Probable jurisdiction should be noted and the case advanced for hearing at as early a date as may be consistent with this Court's convenience.

Dated: Syracuse, New York, October 22, 1964.

Respectfully submitted,

JOHN H. HUGHES and
LAWRENCE M. RULISON,
*Attorneys Pro Se,*
600 O. C. S. Bank Bldg.,
Syracuse, New York 13202

RICHARD S. SCOLARO,
*Counsel*

## APPENDIX A

### July 27, 1964 Decree of District Court

1. Pursuant to Rule 34 of the Rules of this Court, the order and judgment of the Supreme Court of the United States be, and it hereby is, made the order and judgment of this Court;

2. The scheme of legislative apportionment of the State of New York is hereby declared to be unconstitutional and void as being in conflict with the XIV Amendment of the Constitution of the United States;

3. Inasmuch as the primary elections of June 2, 1964, had been held and nominees chosen prior to the decision of the Supreme Court of June 15, 1964, and in view of the imminence of the 1964 election of Members of the New York State Legislature and in order to give the New York State Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, the 1964 election of Assemblymen and Senators shall be conducted as presently scheduled; provided that the terms of said Members so elected on November 3, 1964, or at any special election to fill vacancies, shall expire on December 31, 1965, and providing further that not later than April 1, 1965, the Legislature shall have enacted into law a valid apportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965, Members so elected to hold office for a term of one year ending December 31, 1966.

4. That the Members of the New York Legislature elected at said general election to be held on November 3, 1964, and such Members, if any, as may be elected at any special

election during the year 1965 to fill vacancies in the New York Legislature, shall have for the calendar year 1965 only the full powers and privileges presently prescribed;

5. Plaintiffs' application for further injunctive relief is denied without prejudice to renewal upon notice for good cause shown; and

6. This Court retains jurisdiction of this case to conduct further proceedings as may be necessary.

Dated: New York, New York
July 27, 1964

(signed) STERRY R. WATERMAN
U. S. Circuit Judge

(signed) SYLVESTER J. RYAN
U. S. District Judge

(signed) RICHARD H. LEVET
U. S. District Judge

Office-Supreme Court, U.S.
FILED
NOV 21 1964
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1964**

Nos. 611 and 623

JOHN P. LOMENZO, Secretary of State of the State of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
*Appellants,*

and

JOHN H. HUGHES and LAWRENCE M. RULISON,
*Intervenors-Appellants,*

*against*

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,
*Plaintiffs-Appellees,*

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; MAURICE J. O'ROURKE, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## MOTION TO AFFIRM

LEONARD B. SAND
Robinson, Silverman, Pearce, Aronsohn & Sand
230 Park Avenue
New York, N. Y. 10017

MAX GROSS
Concourse Plaza Hotel
Bronx, N. Y. 10451
*Attorneys for Plaintiffs-Appellees*

LEO A. LARKIN
Corporation Counsel of the City of New York
Municipal Building
New York, N. Y. 10007
*Attorney for Defendants-Appellees Paul R. Screvane and Maurice J. O'Rourke, James Power, John R. Crews and Thomas Mallee*

JACK B. WEINSTEIN
County Attorney of Nassau County
Nassau County Exec. Building
West Street
Mineola, New York
*Attorney for Defendant-Appellee Eugene H. Nickerson*

ROBERT B. McKAY
Vanderbilt Hall
Washington Square
New York, N. Y.
*Attorney for American Jewish Congress, American Civil Liberties Union, N.A.A.C.P. Legal Defense and Educational Fund, Inc., Parties Amici Supporting Plaintiffs-Appellees*

# INDEX


PAGE

Statement ..... 2

Argument ..... 5

Conclusion ..... 9


## CITATIONS

### Cases


*Brown* v. *Board of Education*, 349 U. S. 294 ..... 6

*Fortson* v. *Toombs*, No. 300, Oct. T. 1964 ..... 5fn, 8fn

*Mann* v. *Davis*, Civ. 2604 E.D. Va., Order, Sept. 18, 1964 ..... 5fn

*Matter of Sherrill* v. *O'Brien*, 188 N. Y. 185 ..... 7fn

*M'Culloch* v. *Maryland*, 4 Wheat. 316 ..... 7

*Parsons* v. *Buckley; Hoff* v. *Buckley*, Nos. 624-625, Oct. T. 1964 ..... 5fn

*Reynolds* v. *Sims*, 377 U. S. 533 ..... 5, 6

*Thigpen* v. *Meyers*, No. 5597, W. D. Wash., Decree, Oct. 5, 1964 ..... 5fn

*WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 ..... 2, 5, 8


### Statutes


New York State Constitution:

Article III, §2 ..... 7

Article XIX, §1 ..... 7


### Miscellaneous


XI Court Decisions on Legislative Apportionment, Nat. Munc. League, Sept. 1964 ..... 5fn

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1964**

Nos. 611 and 623

JOHN P. LOMENZO, Secretary of State of the State of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, *Appellants,*

and

JOHN H. HUGHES and LAWRENCE M. RULISON, *Intervenors-Appellants,*

*against*

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY, *Plaintiffs-Appellees,*

and

PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; MAURICE J. O'ROURKE, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City, *Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, plaintiffs-appellees WMCA, Inc., R. Peter Straus, *et al.*, move that the judgment of the district court be affirmed. In this motion they are joined by defendants-appellees Paul R. Screvane, President of

the City Council of the City of New York, Eugene H. Nickerson, County Executive of Nassau County, and the Commissioners of the Board of Elections of the City of New York.

## Statement

This is a direct appeal from an order entered on August 4, 1964 by a three-judge district court in implementation of this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, decided on June 15, 1964.

On June 24, 1964 (Tr. 28), appellees served a proposed order on mandate.[1] It followed precisely the prayer for relief of the complaint which had been filed on May 1, 1961 (Tr. 28). The proposed order would have declared the existing apportionment provisions invalid and enjoined the conduct of any election pursuant thereto. It would have further provided that the court proceedings be recessed until July 27, 1964 to enable the state authorities themselves to take implementing action (R. 2-7).

Upon the issuance of this Court's mandate, on Saturday, July 11, 1964, the district court ordered a hearing on July 15, 1964 to "hear the suggestions of all parties with reference to proper remedies, under equitable principles, that it would be desirable to adopt for the purpose of implementing the mandate of the Supreme Court of the United States" (R. 8).

The appellants filed no papers at or prior to the July 15 hearing (Tr. 13), took the position that the November 1964 elections should proceed under the existing, concededly invalid, apportionment formula (Tr. 11) and made no suggestions for implementation of this Court's decision prior to the November 1966 election (Tr. 16, 26).

---

1. This action was taken prior to the issuance of this Court's mandate. Appellees had, however, requested that appellants sign a stipulation to have the mandate of this Court issue forthwith. No such stipulation was signed by appellants (Tr. 10).

At the conclusion of the July 15 hearing, the district court declared the present scheme of apportionment to be "unconstitutional and void" but did not enjoin the conduct of an election thereunder and recessed until July 24 [subsequently amended to July 27] "to await action, if any, by the duly constituted authorities of the State of New York in the light of this declaration and to hear any further representation by the parties litigant toward further implementation of the judgment of the court" (Tr. 78-79). At the July 15 hearing, Judge Ryan indicated (Tr. 54) that it might be advisable for appellees to be prepared, on July 27, with a specific plan for an actual reapportionment of the State.

By July 27, 1964, the State had taken no implementing action and appellees submitted a proposed Further Order on Remand (R. 125-245) which would have provided that "unless on or before August 3, 1964 the legislature of the State of New York shall have enacted and the Governor shall have signed a valid reapportionment law to apply to the next election to be held of the state legislature, this court will, on August 3, 1964, promulgate an order adopting, as an interim measure effective until such time as the State shall enact a valid reapportionment, one of the plans annexed hereto * * *". Annexed to appellees' proposed order were three reapportionment plans, each of which would have been effective prior to the November 1964 election.

Appellants submitted a proposed order which would merely have permitted the November 1964 election to be held under the existing unconstitutional apportionment formula and again made no representations or suggestions as to any implementation of this Court's decision prior to the November 1966 election (R. 253-255).

It was against this background that the court on July 27th, after several hours of deliberation (Tr. 193), promulgated the order which is the subject of this appeal. That order permitted the November 1964 election to be conducted under the existing apportionment:

> "* * * provided that the terms of said Members so elected on November 3, 1964, or at any special election to fill vacancies, shall expire on December 31, 1965, and providing further that not later than April 1, 1965, the Legislature shall have enacted into law a valid reapportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965. Members so elected to hold office for a term of one year ending December 31, 1966." (J. St. 12)[2].

Immediately prior to the oral announcement of this order, Judge Waterman stated (Tr. 193):

> "You will note that it does not prevent the voluntary action within the timetable set forth of either the Governor or the Legislature."

In other words, the district court explicitly left it open to the Governor and Legislature to adopt a valid reapportionment prior to the November 1964 election, thus preserving the normal two-year term of office and eliminating the need for an additional election in 1965.

No implementing action was taken by the State and this appeal was noted by appellants (R. 474-478) and by two state senators who, on August 24, 1964, were granted leave to intervene as defendants (R. 472-473; 479-483).

---

2. References designated "J. St." are to the Appellants' Jurisdictional Statement. The Jurisdictional Statement of Intervenors-Appellants is referred to as "Int.-App. J. St.".

## Argument

The sole question presented by this appeal is whether the equitable powers of the district court enabled it to promulgate an order which: (a) permitted, as a matter of grace, a continuation of the existing unconstitutional malapportionment for only one, but not for two years, although the state constitution provides for a two-year term of office, and (b) set a deadline of April 1, 1965 for the adoption by the State of a valid apportionment. Such power clearly exists and has been exercised by courts in other reapportionment cases.[3] A contrary conclusion would frustrate reasonably prompt compliance with this Court's decisions and would impose a severe restraint upon the adoption, under equitable principles, of implementing orders. The appeal presents no substantial question and the order of the district court should be affirmed.

In remanding this case to the district court, this Court charged it with the responsibility of determining "under equitable principles" the date by which the New York State Legislature must be based upon a constitutionally valid apportionment. *WMCA, Inc.* v. *Lomenzo*, 377 U. S. at 655. See also *Reynolds* v. *Sims*, 377 U. S. 533, 585.

---

3. For example, the term of office of legislators has been reduced by court order in *Mann* v. *Davis*, Civ. 2604, E.D. Va., opinion and order dated Sept. 18, 1964, application for stay denied by the Chief Justice, Oct. 28, 1964, and in *Thigpen* v. *Meyers*, No. 5597, W.D. Wash., Decree, Oct. 5, 1964.

In some instances far more sweeping orders have been entered. See, *e.g.*, *Fortson* v. *Toombs*, No. 300, Oct. T. 1964, probable jurisdiction noted Oct. 12, 1964. For modification of this Order, see Motion to Dismiss, No. 300, pp. 19-21. See also *Parsons* v. *Buckley*; *Hoff* v. *Buckley*, Nos. 624-625, Oct. T. 1964. For other implementing orders, see opinions collected in XI Court Decisions on Legislative Apportionment, Nat. Munc. League, Sept. 1964.

Compare *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1954) where this Court wrote:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs".

There is no question that, under *Reynolds* v. *Sims*, *supra*, the district court could have ordered an immediate reapportionment. However, if appellants' contention is sound, the district court would have been limited to a choice between ordering such an immediate reapportionment or permitting the continuation of the unlawful condition for a period of two years (J. St. 5). Appellees had urged that sufficient time remained prior to the November 1964 election for an immediate reapportionment to be effective, but appellants strongly resisted this contention. Moreover, appellants offered not a single suggestion or representation as to any implementing action which they were willing to take which would have been effective prior to November 1966. It ill behooves appellants, therefore, to complain about the inconvenience and expense occasioned by the election ordered by the district court in 1965. And, surely the private interest of intervenors-appellants in avoiding the additional campaign expense they would incur should they become candidates for the State Senate in November 1965 (Int.-App. J. St. 7-8) hardly furnishes a basis to continue for an additional year the violation of the individual constitutional rights of the over 16,000,000 citizens of the state.

Appellants argue (J. St. 10) that nothing in the United States Constitution conflicts with a two-year term for state legislators. But this position overlooks the ele-

mentary constitutional principle that, when otherwise innocuous provisions of state law become vehicles for frustrating compliance with the Federal constitution, they may be temporarily suspended. "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operation from their own influence." *M'Culloch* v. *Maryland*, 4 Wheat. 316, at 427.

The court below did not void the provisions of Article III, Section 2, of the New York state constitution relating to dates of elections and terms of legislators[4]. The court merely suspended their operation until 1966 when New York State elects both a governor and a legislature. By employing the device of two successive one-year terms, the three-judge court not only brought the election of the legislature and the governor back into phase, but also gave the legislature additional time to enact a valid reapportionment scheme, without depriving the citizens of New York State of their constitutional rights for an unconscionably long period of time. Recourse to the amendment procedure contained in Article XIX of the New York state constitution would have been of no avail because, if that provision were applied, reapportionment of New York would be delayed until at least 1969 (see Article XIX, Section 1) with the result that the people of New York would be denied fair representation for five more years.

In requiring that New York be reapportioned by April 1, 1965, the three-judge court did not take the New York

4. Contrary to appellants' suggestion (J. St. 8), there would be no substance whatever to any challenge directed at the validity of legislative enactments based on an allegation that the legislature was not elected in conformity with the state constitution. *Matter of Sherrill* v. *O'Brien*, 188 N. Y. 185, 211-213.

legislature by surprise. WMCA originally brought suit in May 1961. This Court's remand of the case in 1962, *WMCA, Inc.* v. *Simon*, 370 U. S. 190, served to notify the State that its reapportionment scheme was of questionable validity[5] and the decision of this Court on June 15, 1964, of course, left no doubt. Reapportioning New York State within the time allotted is not an onerous task for the legislature. With limited means, appellees prepared, in twelve days, three different plans (R. 125-196). The Governor has already announced that he will call a special session of the outgoing legislature to meet in early December 1964 to adopt a new apportionment. New York Times, Oct. 20, 1964, p. 32.[6]

Appellants seek to bolster their contentions by references to statements made by individual members of the court during oral argument at the July 15 and July 27 hearings (J. St. 7). We fail to see any significance to expressions of doubt by a single judge in view of the fact that, after deliberation, that judge joined in the unanimous decree of the court. Equally without merit, is the contention (J. St. 7), similarly based on colloquy during argument, that the district court believed that it was compelled by the Supremacy Clause to enter its order. The district court made explicit in its orders of July 11 (R. 8), July 15 (Tr. 79) and July 27 (J. St. 12, ¶3) that it was engaged in a process of weighing the equities in order to formulate a proper remedy that would meet local

5. The Governor announced at that time that he was ordering a special staff study on the need for reapportionment. Affidavit of R. Peter Straus, R. 9, 10; New York Times, June 11, 1962, pp. 1, 26. The results of the study have never been made public.

6. If, as a result of what occurs at any legislative session or as a result of any other developments occurring subsequent to the promulgation of the order of the district court, a modification of that order seems appropriate, an application for such modification may be made to the district court which has retained jurisdiction of this case. Cf. *Fortson* v. *Toombs, supra*, p. 5, fn. 3.

conditions and be desirable under all the circumstances. In language and in action, the district court demonstrated that it properly discharged its responsibility to determine "under equitable principles" what form of order would best adjust and reconcile public and private needs and would best serve the interests of the people of New York State.

## CONCLUSION

**For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The order of the three-judge district court should be affirmed.**

Respectfully submitted,

LEONARD B. SAND,
Robinson, Silverman, Pearce, Aronsohn & Sand
MAX GROSS,
*Attorneys for Plaintiffs-Appellees.*

LEO A. LARKIN,
*Attorney for Defendants-Appellees Paul R. Screvane and Maurice J. O'Rourke, James Power, John R. Crews and Thomas Mallee.*

JACK B. WEINSTEIN,
*Attorney for Defendant-Appellee Eugene H. Nickerson.*

ROBERT B. MCKAY,
*Attorney for American Jewish Congress, American Civil Liberties Union, N.A.A.C.P. Legal Defense and Educational Fund, Inc., Parties Amici Supporting Plaintiffs-Appellees.*

November 1964

MICRO CARD 22
TRADE MARK ®

MATTHEW BENDER & COMPANY
MB
69-7543
m
microcard

PC22743